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Nevin Van de Streek

WHY NOT "FINDINGS OF LAW" AND "CONCLUSIONS OF FACT" AND OPINIONS ABOUT BOTH?

NEVIN VAN DE STREEK*

I. WHY MUST FACTS BE FOUND - ARE THEY LOST?

One of the few disagreeable aspects of winning a bench trial is that the judge will probably ask you to submit for his or her consideration proposed "Findings of Fact, Conclusions of Law, and an Order for Judgment." Who among scrupulous lawyers has not twisted in agony while doing so because of uncertainty over whether a particular statement is a finding of fact, instead of a conclusion of law, or vice-versa? (Of course, the less than scrupulous lawyer is going to label nearly every statement a "finding of fact" with the hope thereby of staving off a successful appeal.) The practice of some trial judges—who insert boiler plate provisions in their "findings" and "conclusions" to the effect that if an appellate court finds one to be the other, it is, in its new guise, reaffirmed by the trial judge—indicates to me that judges are likewise uncertain as to what sort of statements belong in each classification. (Well, actually, I suspect that some trial judges who follow this practice feel that they know quite well what is a conclusion of law and what is a finding of fact, but they are uncertain whether the appellate judges are as perceptive.)

So, in order to diminish my anguish over deciding what is a finding of fact and what is a conclusion of law in the context of drafting something to lay before the judge (which, alas, is an anguish to which I am not often enough exposed), I have paid some attention over the years to what appellate courts say when they gently reprove a trial judge for "finding" when he or she should be "concluding," or vice-versa. This makes for some interesting reading. Indeed, I seem to recall a case which the North Dakota Supreme Court handed down some years ago, which I cannot now readily find, wherein the justice who wrote the opinion labored mightily to establish that the trial judge had erroneously found something to be a conclusion of law, when truly it was a finding of fact, whereupon

* Partner in Eaton, Van de Streek, and Ward, Attorneys-at-Law, Minot, North Dakota; J.D., 1970, University of Michigan School of Law, (*cum laude*); A.B., 1967, Stanford University. Former Chair of the North Dakota State Bar Continuing Legal Education Commission and former President of the North Dakota Municipal Attorneys Association. Member of the Title Standards Committee of the Real Property, Probate and Trust Section of the State Bar Association.

the court proceeded to set aside the newly-christened finding of fact on the grounds that it was clearly erroneous!

Some time ago, after a fair amount of such reading, I reached the humbling conclusion that I am not very good at distinguishing between findings and conclusions. Now, however, rather than living quietly and uncomplainingly with that incubus, I have decided to cast it off. Hence, I have written this viewpoint article to explore the following propositions: (1) the law is very much misguided in attempting to observe a rigid (and very artificial) distinction between "findings of fact" and "conclusions of law;" (2) the net result of such effort is to sow a great deal of confusion into the law, with a resulting loss in efficiency and gain in unpredictability; (3) things would be improved, albeit perhaps only marginally, if the profession and judiciary openly acknowledged how seldom a pure finding of fact is encountered, and how often the proper resolution of an issue is not truly a conclusion of law, but rather a matter of opinion, although, to be sure, an opinion influenced by the law.

II. YOU JUST CAN'T SEEM TO GET A GOOD FACT ANYMORE THESE DAYS.

In a typical lawsuit, there are very few "pure" factual issues or "pure" findings of fact in which legal concepts play no part. In speaking of a "fact" in this context, I mean to use the term as a historian or biographer might use it, in saying, for example, that the Battle of Waterloo was fought on June 18, 1815, and Napoleon's conduct of the battle was affected by ill health. Facts in this sense are occurrences which are observable by the senses; they are events which could be captured by a video camera.

By way of contrast to this use of the word "fact," when courts speak of a finding of "fact," they frequently are not thinking exclusively about an occurrence—like the Battle of Waterloo—which is discernable solely through the use of the senses. Rather, they are referring to intangible things like thoughts, emotions, and mental conditions which usually cannot be directly perceived by the senses, but which must be inferred. (Admittedly, such inferences are drawn from some observable physical manifestations of a thought, emotion, or mental condition.)

By way of illustration, let us assume that a judge or jury, after hearing the relevant evidence, determines that on such and such a date Darwin Debtor gave a promissory note and a mortgage on Black Acre to Matthew Moneylender. Without more, most judges and lawyers, if asked to characterize that determination, would answer without hesitation that it was a "finding of fact." If pressed to justify that opinion, they might respond that such a determination seems to be pretty much equivalent to a jour-

nalist's "who, what, when, where" lead paragraph (and everyone knows that journalists deal in nothing but facts).

But really, this "factual" determination concerning Darwin Debtor is heavily permeated by legal concepts. To put it somewhat differently, it comes wrapped in an invisible gauze of assumptions concerning legal matters. A lawyer who is faced with this apparently simple statement will more likely than not, and more or less unconsciously, make all of the following legal assumptions (and others I cannot think of): that the mortgagor was mentally competent, was not under duress, was not the victim of fraud, was not a minor, was not laboring under a mutual mistake of fact, was the owner of Black Acre, was not mistaken as to the identity of either the land he was mortgaging or of the mortgagee, was not prevented from mortgaging Black Acre under the homestead laws or because of some other legal disability, executed documents which were unambiguous and legally sufficient in form, received valid consideration for the giving of the note and mortgage, and was not engaged in a sham transaction to defraud his creditors.

Indeed, one need only look at the multitude of interlocking and complex provisions in the Uniform Commercial Code which define a "negotiable instrument" to conclude that it is somewhat misleading to label as a finding of fact the statement that "A gave B his promissory note."

I contend that the only "pure" findings of fact in a typical lawsuit are those which involve everyday concepts not drawn from legal lore. Examples include a finding that "the defendant's car drove through a red light when it collided in the intersection with the plaintiff's truck" or that "the plaintiff gave birth to a child in December of 1991." All other determinations should be recognized as being infused or alloyed—to a greater or lesser degree—with legal concepts. Obviously this is not a novel notion, as courts have often noted the existence of "mixed questions of law and fact."[1] What I contend, however, is that the scope of such "mixed questions" is vastly larger than is usually acknowledged, and indeed, that "pure" issues of fact are quite rare in lawsuits, other than, perhaps, those suits involving personal injury tort claims.

III. THERE'S GOT TO BE A DIVINE PURPOSE HERE SOMEWHERE.

A. JURIES NEED CORRALS.

Once it had finally dawned on me that, apart from tort claims, most lawsuits only rarely involve pure issues of fact, I began to wonder why the

1. *See* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2589 (1971).

law so assiduously strives to achieve some sort of compartmentalization between findings of fact and issues of law. There must be at least an intuitive feeling among jurists, if not a fully articulated theory, that worthwhile goals or purposes are being accomplished by the effort. One such goal which occurred to me is to achieve a proper division of labor between the trial judge and the trial jury when it comes to deciding the various issues raised during a jury trial. Surely, thinking in terms of "issues of fact" and "issues of law" would assist in accomplishing that goal, because, after all, juries are supposed to decide the former and judges the latter.

Yet, the more I thought about that proposition—that conceptualizing issues in a lawsuit as being either "factual" or "legal" assists in dividing responsibilities between judge and jury—the more doubtful I became about its validity. Ultimately, I concluded that the categories of "factual issues" and "legal issues" should not be all that important in determining what gets put to the jury and how.

B. BUT WHERE TO BUILD THE FENCES?

The problem of deciding what belongs to the jury and what belongs to the judge is presented most acutely when a new statute is applied for the first time, particularly when the statute is broadly phrased. One has to wonder what the federal trial judges thought when they were first handed the Sherman Anti-Trust Act.[2] As originally enacted, the first sentence of Section 1 read as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[3] The second sentence went on to provide that anyone who made a contract or who entered into a combination "hereby declared to be illegal"[4] was guilty of a felony.

In theory, a felony prosecution could have been brought under the Act in which the judge would have charged the jury somewhat as follows:

> The defendant is charged with violating the Sherman Act. The Act declares to be illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." You have heard the evidence against the defendant. How do you find, guilty or not guilty, under the Sherman Act?

2. *See* 15 U.S.C. §§ 1-7 (1988).
3. *Id.*
4. *Id.*

Of course, I doubt whether any prosecution which employed such cursory jury instructions has ever been brought under the Sherman Act. Quite the contrary. The courts have amplified and explicated the Act with detailed, complicated, and somewhat abstruse doctrines and rules which find their practical expression in the form of lengthy and detailed jury instructions.

And this brings up an interesting point. If a judge gives detailed and comprehensive jury instructions relating to the substantive law to be applied by the jury (as opposed to "housekeeping" instructions), the judge is staking out a relatively large perimeter surrounding the "legal" issues which the jury must not cross. The preserve left to the jury, finding the "facts" of the case, is correspondingly diminished. This follows because ordinarily the more detailed and comprehensive the instructions, the less discretion the jury enjoys to "make law" by applying its own notions as to what the statute really says, or as to what elementary fairness requires.

Unfortunately, courts don't tell us practitioners much (in fact, hardly anything) about how they decide (1) the extent to which a jury should be allowed to make its own determination as to what a statute really means and (2) the extent to which that burden or privilege is to be taken from their hands by means of the preemptive effect of jury instructions. Maybe the reason judges are so mum on the subject is because they seldom think about how they do what they do, they simply do it. Because there is no body of law or established doctrine which attempts to set forth, as a general proposition, how trial courts are supposed to distinguish judge issues from jury issues, trial judges are left largely to their own intuition about such matters.

There is a reason, in my opinion, why no generally recognized rule of thumb exists to distinguish jury issues from judge issues. Under the present scheme of things, such a rule must attempt, implicitly or explicitly, to distinguish between findings of fact and conclusions of law in order to be consistent with the supposed rule that juries are assigned fact issues, and judges are assigned legal issues. But such attempted distinction is so unrealistic and unworkable, because of the amalgamation of fact and law earlier noted, as to make it impossible to devise a sensible and workable rule.

C. AND BUILDING A STRAIGHT FENCELINE ISN'T SO EASY.

The needless and frustrating complexities which result from attempting to artificially distinguish between findings of fact and conclusions of law is illustrated by *Woodall v. City of El Paso*.[5] *Woodall* was a jury trial

5. 950 F.2d 255 (5th Cir. 1992).

which involved a relatively rare form of challenge to the sort of zoning ordinance which regulates the location of adult businesses. Although lawsuits challenging such ordinances are common, such suits usually do not involve a jury because only injunctive or declaratory relief is requested. Even when damages are sought, the plaintiff in most instances is inclined to waive a jury on the theory that the judge is more likely than a jury to disregard the rather unsavory and unpopular nature of the plaintiff's business. In *Woodall*, the damages issue went to a jury.[6] (The party requesting the jury is not indicated in the opinion, but perhaps the defendant City wanted a jury trial for the same reason that the plaintiff would not.)

A claim triable to the jury having been raised, the trial judge had to wrestle with framing jury instructions which would properly present the appropriate issues of fact to the jury. One First Amendment issue arising in any adult zoning case is whether the zoning unduly restricts public access to adult materials. The Supreme Court created this "undue restriction on access" or "adequate access" issue in the *Young v. American Mini Theatres*[7] case, in which it first upheld the constitutionality of restrictive zoning of adult entertainment centers, by noting that the particular ordinance it was then reviewing did not have "the effect of suppressing, or greatly restricting access to, lawful speech."[8]

Of course, whenever the Court makes an observation that the record does, or does not, disclose a particular situation or certain circumstances, and indicates further that the state of the record in that regard is significant, the Court generates a potential issue for future similar cases. Unfortunately, issues thus created often do not parse easily into "issues of fact" components and "issues of law" components. So it was in *Woodall* with regard to applying the "not unduly restrictive" test of *Young*. Is the test ultimately an issue of law to be decided by the trial judge? Or is it an issue of fact? Or, alternatively, is the test *sufficiently* an issue of fact (recognizing, as most courts do, that some issues are "mixed" issues of law and fact) to be put to the jury? In short, how is the jury supposed to handle, if at all, the "not unduly restrictive" test?

The *Woodall* trial court addressed this problem by instructing the jury with an excerpt from the Supreme Court opinion in *Renton v. Playtime Theatres, Inc.*[9] In *Renton*, the Court rebuffed an argument that the Renton, Washington, ordinance flunked the unduly restrictive test.[10] The resulting *Woodall* instruction read thus:

6. Woodall v. City of El Paso, 950 F.2d 255, 257 (5th Cir.), *cert. denied*, 113 S. Ct. 304 (1992).
7. 427 U.S. 50 (1976).
8. *Woodall*, 950 F.2d at 259 (citing Young v. American Mini Theatres, 427 U.S. 50, 71 n.35 (1976)).
9. 475 U.S. 41 (1986).
10. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)

> [f]or the purpose of determining whether acreage or sites are "reasonably available," you are instructed that adult entertainment businesses must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees. Acreage and sites are not "unavailable" solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment sites within the area which complies with the ordinance. Although the First Amendment guards against the enactment of zoning ordinances which have "the effect of suppressing, or greatly restricting access to lawful speech," the First Amendment does not compel the City of El Paso to insure adult entertainment businesses, or any other kind of speech related businesses, will be able to obtain sites at bargain prices.[11]

The judge also used a special verdict form, i.e., "special interrogatories" on the "reasonable access" issue.[12] The jury found that under the various ordinances being challenged, the City made 1165 acres of land available on which 59 new adult businesses could operate, in addition to the 39 such businesses already operating.[13] In so finding, it rejected in part both the City's and the plaintiffs' evidence on the "reasonable access" issue.[14] The jury also found that the ordinances did not deny the plaintiffs "a reasonable opportunity to open and operate their adult entertainment businesses."[15] The appellate court recites this procedural history and then goes on to make the somewhat murky remark: "The district court upheld the Ordinances' constitutionality pursuant to the jury's verdict."[16]

This remark is murky because it could be read as saying the judge entered a judgment in favor of the City as a ministerial act based on the jury verdict (as is the practice in federal court in which the judge and not the clerk of court enters the judgment). Or, it can be read as saying that the judge used the jury's findings as the basis for reaching a conclusion of law, after applying the appropriate legal principles to the facts thus found.

In any event, the appellate court reversed the lower court's decision on the grounds that the jury instruction quoted above provided insufficient guidance to the jury on the "reasonable access" issue. Later, the

11. *Woodall*, 950 F.2d at 257.
12. *Id.* at 262 n.6.
13. *Id.* at 257.
14. *Id.* at 262.
15. *Id.* at 257.
16. *Woodall*, 950 F.2d at 257.

appellate court issued a curious opinion[17] in which it withdrew some of the discussion in its earlier opinion with regard to the applicable legal principles which should be brought to bear on the reasonable access issue. At the same time, it also expanded somewhat on its holding as to what additional instructions the jury should have been given.[18]

Specifically, the instructions that the trial court should have given, according to the *Woodall* appellate court, was that in considering the availability of land within the community on which to open and operate an adult entertainment center, the jury should disregard land with physical characteristics that render it unavailable for any kind of development or with legal characteristics (restrictive covenants) that exclude adult businesses.[19] By not fine-tuning its definition of "unavailable" land, the trial court, in the eyes of the reviewing court, allowed for the possibility that the jury would find land to be "available" which, as a matter of law, was "unavailable."[20]

My point in discussing *Woodall* at length is not to claim that it was rightly or wrongly decided in either court, but rather to illustrate that there is something seriously amiss in our system, or lack of system, in deciding what issues are jury issues and what issues are judge issues. Here we have a situation where the United States Supreme Court has announced a legal principle in one case, the "no undue restriction of access" principle, and then expounded on the principle at length in a later case. One would think, and perhaps the *Woodall* trial judge thought, that since the Court has "laid down the law," one need only give the Court's exposition of the law as a jury instruction and that any issues not directly addressed therein are, almost by definition, issues of fact to be decided by the jury.

Yet, the *Woodall* appellate court tells us that this isn't so. By implication, the circuit court is saying that at least in this instance, the Supreme Court paints only with a broad brush, and consequently, the trial courts must fill in many details with a fine brush. I have no quarrel with trial judges being required to do so. My concern is that the fine brush work tends to get smeared by the erroneous, but widely proclaimed, notion that legal disputes divide more or less readily into distinct issues of fact and issues of law.

17. Woodall v. City of El Paso, 959 F.2d 1305 (5th Cir.), *cert. denied*, 113 S. Ct. 304 (1992).
18. *Id.* at 1306.
19. *Id.*
20. *Id.*

IV. JURIES DON'T NEED CORRALS; THEY NEED CASTING DIRECTORS.

Cases like *Woodall* convinced me that an attempt to recognize and preserve a dichotomy between legal issues and factual issues (1) did not provide much practical assistance to a trial judge or trial counsel in drafting jury instructions intended to present only issues of fact to the jury, and (2) did not sufficiently explain why, in a given instance, an appellate court would reverse a trial court for giving "insufficient" jury instructions. So I began to ponder the possible effects on the foundation of the Republic if the courts suddenly disavowed the supposed dichotomy between legal issues and factual issues. What if they said that instead of there being a division between law and fact, there was a continuum with law on one end and fact on the other? How would that affect the manner in which judges go about drafting jury instructions?

Well, it might lead to an assignment of responsibility between judge and jury based upon a functional analysis as to what a jury does better than a judge, and vice-versa. In that connection I cannot help but recall an observation that I have often made to myself (although I am sure it is not original with me): that lawyers and judges allow a jury to decide only those issues which are too difficult for the lawyers and judges themselves to decide. These issues are usually notions of "fairness" or "reasonableness" and the like. Few would dispute that issues of this sort should continue to be given to the jury to decide. Also, of course, the jury should be expected to continue to discharge its traditional function of assessing the credibility of witnesses.

So if the decision in a case looks like it is going to turn mainly on a question of whether someone acted "reasonably" under the circumstances or whether a party is telling the truth, the instructions should be crafted so that the jury passes on those issues. Admittedly, as matters now stand, juries routinely handled such issues as a matter of tradition and practice.

But what should be done in novel and complex cases like *Woodall*, where the respective provinces of jury and judge are not staked out by centuries of tradition? That case presented a difficult "mixed issue of fact and law:" whether the particular zoning ordinances under review afforded the public the minimum access to adult materials mandated by the First Amendment. What elements of a complex mixed issue of fact and law like that presented in *Woodall* are issues for the court to decide as a matter of law, and which issues must the court foreclose the jury from tampering with, by means of the jury instructions it gives?

The answer I offer is that courts should try to fashion jury instructions in such a manner that the jury is left to deal with three broad categories of issues.

The first category would consist of the "who really said or did what to whom" issues, which as suggested previously could be called biographer's or historian's questions. In other words, we are speaking of "pure" issues of fact, such as whether the traffic light was red in the direction of the defendant when she drove into the intersection and struck the plaintiff's car. If the answer to that single question will essentially decide the case, a general verdict rather than a special verdict would be used. But if the case is more complex, such as one involving a claim that the defendant violated the federal anti-discrimination in employment laws by maintaining a "hostile working environment" for members of the plaintiff's protected class, the jury would be asked to decide by way of special verdict, for example, whether the plaintiff's supervisor really called him a "dumb honky," as the plaintiff complains.

The second category would include issues calling for the jury to exercise as the surrogate for the community from which it is drawn, the community's sense of fairness, reasonableness, meetness, and proportion. An example would be when the issue is whether someone was "negligent" or "reckless" under all the facts and circumstances of which the jury has been made aware.

The third category of jury issues would consist of those arising when someone is asked to look into a fellow human's soul. Consider the case of the man who, in the middle of the night, shoots his wife dead as she returns from the bathroom to their bedroom. Did he do so because he mistook her for an intruder, as he testifies, or because he wanted to be rid of his wife, as the prosecution seeks to show? This is the sort of "soul-searching" issue the jury should decide. (I grant that this category is really only a subcategory of the first category, but it sounds more dramatic this way, and law review articles are sorely devoid of drama.)

The judge would be obligated to decide the remaining questions, sometimes in the form of a memorandum opinion based on the jury's special verdict findings, and sometimes in the form of jury instructions.

Obviously, this approach would not be a panacea for the problem inherent in dividing responsibilities between judge and jury, which I claim is a problem needlessly worsened by the effort to maintain an artificial barrier between findings of fact and conclusions of law. Yet, it would be an improvement, I contend. At least it is worth a try. Thus, in a case like *Woodall*, for example, I hope the judge would make an analysis somewhat like the following before drafting the jury instructions:

> I realize that the issue as to whether a zoning ordinance—which restricts the location of adult entertainment centers—allows constitutionally sufficient public access to adult materials, is not an issue the average citizen grapples with each morning while commuting to work. It is an artificial concept, a construct of First Amendment law. It is my duty as a judge to translate a rather abstract and sweeping observation made by the Supreme Court, to justify in part its broad and far-ranging announcement of a new doctrine of law, into composite legal principles, and then to incorporate these legal principles into appropriate jury instructions which create concrete issues of fact which the jury can decide. I must give the jury the opportunity to use the everyday skills, abilities and common sense that we judges, usually with good cause, attribute to jurors.
>
> The central question in this case is whether a new adult entertainment center can find a location in El Paso on which to operate its business with sufficient profitably to justify its staying open, even if under the challenged ordinances it might not be able to generate as much profit as it could if the ordinances did not exist.
>
> Therefore, rather than requiring the jury to grapple with cumbersome, abstruse and somewhat nebulous questions which would require them to reason like a town planner or real estate developer—such as how many additional adult entertainment centers could theoretically open in the community, or how many acres of land are theoretically available for such development—I am going to instruct the jury that in order for the plaintiff to prevail, he/she must convince the jury that he/she made a reasonably exhaustive effort in good faith to find a suitable location in which it could operate in conformity with the ordinances, with sufficient profitability to justify staying open, but that ultimately it was unable to do so.

Framed in this fashion, the jury issues in *Woodall* become ones to which the jurors can more easily apply their common sense, community values, and lessons of every day experience. They can pass judgment on whether the plaintiff's officers are testifying candidly when they recount in detail the various location searches they conducted. They can decide, assuming that they accept such testimony, that the efforts thus described were "reasonably" exhaustive. They can decide whether the rejection by the plaintiff of certain available sites, as offering too slim a prospect of profit, was "reasonable" under the circumstances. In fact, on that last point, expert testimony is not necessarily called for. If the plaintiff's

officers testify that they rejected a site because it showed no reasonable prospect for profitable operation, the jury members can assess the believability of that statement from their own personal impressions of the witnesses "in the flesh." In so doing, they will be operating no differently than a jury in a tort case which is called upon to assess the trustworthiness of a statement by a witness that he saw the green Buick before the collision and that it was traveling at a very high rate of speed.[21]

V. AN OPINION ABOUT OPINIONS LACKING OPINIONS.

Of course, if the supposed distinction between issues of law and issues of fact were abandoned as a guideline to identifying jury issues, the question would inescapably arise whether the distinction would be worth preserving in bench trials.[22] That judges have to be "ordered" by way of a formal rule to set forth their decisions by means of "separate statements" of "findings" and "conclusions" tends to indicate that it is not a practice which comes to them naturally.[23] But if the rule requiring "separate statements" serves a useful purpose, then undoubtedly it should be retained and enforced. Its purpose is touched upon in Rule 52(a) of the North Dakota Rules of Civil Procedure in the following sentence: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."[24] There is no doubt, then, that the requirement that findings of fact and conclusions of law be stated separately is to assist the appellate courts in their review of lower court decisions. It is intended to indicate to them where they should tread more carefully.

However, if the purpose sought to be accomplished by the "separate statement" rule is not being accomplished, and perhaps is not even being earnestly pursued, then should we bother retaining a rule which has such a purpose? Particularly, should we do so when meaningful compliance with the rule is difficult at best? True, appellate courts contend that they give greater deference to a finding of fact made by the trial judge than they do to a conclusion of law, at least when they agree that it is a factual

21. To be sure, even under these instructions the adult bookstore plaintiff is going to have a difficult time with the jury because of the nature of its trade, but no conceivable instruction which the trial judge might give on the "reasonable access" issue is going to help it on that sore point. The best the judge could do under the circumstances would be to give the jury some sort of cautionary instruction, unless the plaintiff thought it would do more harm than good, and otherwise the question of jury prejudice would have to be handled during jury selection.

22. Rule 52(a) of the North Dakota Rules of Civil Procedure says in pertinent part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . ." N.D. R. CIV. P. 52(a).

23. Many, perhaps most, judges hand down their decisions by way of a memorandum opinion, which they expect winning counsel to covert into formal findings of fact and conclusions of law, as was alluded to at the beginning of this viewpoint.

24. N.D. R. CIV. P. 52(a).

finding. They do so in recognition of the greater ability of the trial judge, having heard the witnesses in the flesh, to make determinations of the witnesses' credibility (meaning thereby both truthfulness and persuasiveness). Some go so far in their zeal on this point that they purport to apply the "clearly erroneous" standard to factual findings made by a trial judge in a case in which there are no live witnesses, only documentary evidence.[25] No doubt these courts would say that the "separate statement" rule has a purpose, that it is a valid purpose, and that the purpose is being accomplished.

Nevertheless, I am skeptical. First, as stated above, I am convinced that most "findings of fact" are suffused with legal concepts in the first place. This makes it difficult to meaningfully divide "law" from "fact" and it makes it easy for appellate judges to relabel "fact" as "law," so as to allow the "clearly erroneous" standard to be disregarded. Second, I am enough of a cynic to think that if, for example, a court is reviewing a case in which the only evidence is documentary and if it thinks the factual findings of the trial judge based thereon are incorrect, it will apply a watered down variety of the "clearly erroneous" rule without acknowledging that it is doing so. Even so, I will concede that because of the "clearly erroneous" standard or because of the reasons behind it, frequently an appellate judge will stay her hand and vote to affirm a decision, largely factual in nature, which she would be loathe to hand down if she were the trial judge. I will also concede, for all the conventional reasons advanced in support of such a conclusion, that this is a good thing.

It is far from clear to me, however, that this good thing would be seriously jeopardized if we abandoned the rule that findings of fact must be labeled such and separately stated from the conclusions of law, which also must be labeled as such. Even in the absence of separately stated findings of fact and conclusions of law, I suspect that a reviewing court can get a pretty fair impression from the record and from the judge's remarks, written or oral, as to the degree the judge's decision turned upon his or her assessment of relative credibility and upon his or her reading of the nonverbal communication which occurred in court.[26]

If I am correct in this supposition, then perhaps instead of using or purporting to use two different standards of review, depending upon whether an issue is one "of fact" or "of law," an appellate court should

25. The courts which take this position, which I find extreme, cannot justify it on the grounds that the trial judge has a greater ability to make credibility determinations. Their rationale seems to be that trial judges, by virtue of the experiences of their office, have better developed "fact finding" muscles (or noses) than do appellate judges, and so should be deferred to while acting as fact finders.

26. One need only read a transcript of a deposition which one did not attend in order to be struck quite forcefully by the importance of nonverbal communication. Oddly enough, reading a transcript of a deposition one did attend seems to convey the same message even more forcefully.

adopt a sliding scale standard of review. Under this standard, the more a trial court's decision on a particular issue appears to have turned upon a determination of the relative credibility (meaning again both truthfulness and persuasiveness) of the witnesses, the more reluctant the court should be to second-guess the trial judge. To be sure, this is probably what already happens informally (and perhaps unconsciously) to a very large extent, because as I keep harping, there are very few "pure" issues of fact in most lawsuits.

Such a sliding scale would not really be that foreign to the workings of the North Dakota Supreme Court, for it readily characterizes certain issues as "mixed questions of fact and law" when it suits its purposes to do so. (Note, however, that trial judges don't ordinarily have a "Mixed Questions" section in their "Findings" and "Conclusions," nor does Rule 52(a) of the North Dakota Rules of Civil Procedure contemplate such a beast.) Although I certainly haven't studied the point thoroughly, it seems to me intuitively true that the state supreme court is most likely to discover such a "mixed question" when it wants to reverse the trial judge. I can't ever recall seeing a case in which the state supreme court transformed a trial judge's "finding of fact" or "conclusion of law" into a "mixed question," and then proceeded to affirm.

For example, in *First Nat'l Bank & Trust Co. v. Hart*,[27] the trial judge was reversed when the supreme court found a "mixed question" presented by the issue whether a guarantor had consented to certain replacement notes being substituted for his original obligation.[28] Further, in *Earth Builders, Inc. v. State*,[29] the trial judge was reversed (over a very strong dissent by a trial judge sitting on the supreme court by designation), when the supreme court found a "mixed question" on the issue whether the state highway department had entered into an option to purchase gravel in good faith and without notice of the rights of a prior gravel lessee under an unrecorded lease.[30] The dissent asserted quite persuasively that under traditional criteria (which criteria would be moot under my proposal for a merger of "law" and "fact"), the ultimate issue presented was an issue of fact.[31]

Conversely, in cases which seem to present an issue which is begging for elevation to the esteemed status of being a "mixed question," such promotion is denied if the decision being reviewed is affirmed. In *Slope County v. Consolidation Coal Co.*,[32] the question presented was whether

27. 267 N.W.2d 561 (N.D. 1978).
28. First Nat'l Bank & Trust Co. v. Hart, 267 N.W.2d 561, 564 (N.D. 1978).
29. 325 N.W.2d 258 (N.D. 1982).
30. Earth Builders, Inc. v. State, 325 N.W.2d 258, 260 (N.D. 1982) (Garaas, D.J., dissenting).
31. *Id.*
32. 277 N.W.2d 124 (N.D. 1979).

a corporation owned more agricultural land than the amount then permissible under the North Dakota anticorporate farming law.[33] The permissible amount was ". . . such as is reasonably necessary in the conduct of [the owner's] business . . ."[34] What is remarkable about *Slope County* is not so much that the court found the ultimate issue to be an issue of fact (since, after all, it affirmed the trial court), but the manner in which it applied the "finding of fact" label. The court stated:

> *Except for the rule that the purpose and objective of the corporation must be taken into consideration*, there are no rules of law applied in determining if land is reasonably necessary in the conduct of a corporation's business. Such a determination is arrived at only by an examination of evidence, including the inferences drawn therefrom. Accordingly, we conclude such a determination is a finding of fact . . .[35]

The court did not explain why, if the purpose and objective of the corporate landowner must be taken into consideration, and if the process of so doing involves the application of a rule of law, no "mixed question" was presented. Moreover, there was an even more pressing reason why a "mixed question" might properly be found to exist, which the court ignored. That is, when the Legislative Assembly enacted the anticorporate farming law, it must have had some public policy considerations in mind, as it did also when it enacted the "reasonably necessary" exception. Should not these considerations properly guide and inform the decision-maker in determining how much land is "reasonably necessary" to the purposes of a landowner who seeks to invoke the exception? If so, is not a "mixed question" inescapably presented?

Intriguing as this point may be, the particular merit of *Slope County* is a delicious passage therein which does more—unintentionally—to persuade the reader about the inutility and artificiality of the distinction between findings of fact and conclusions of law than I can accomplish in pages of argument. It reads as follows:

> The parties disagreed if the determination of whether or not land is reasonably necessary in the conduct of a corporation's business is a finding of fact or a conclusion of law. Because this distinction becomes important in determining our standard of review, we find it necessary to examine the question. In reaching our determination, the following statement by the

33. Slope County v. Consolidation Coal Co., 277 N.W.2d 124, 125 (N.D. 1979). North Dakota's anticorporate farming law was provided in N.D. CENT. CODE § 10-06 (repealed 1993).

34. *Slope County*, 277 N.W.2d at 126 (citing N.D. CENT. CODE § 10-06-03).

35. *Id.* at 127 (emphasis added).

> Supreme Court of Oregon in *Henzel v. Cameron* is particularly relevant: "Whether a finding is a 'finding of fact' or a 'conclusion of law' depends upon whether it is reached by natural reasoning or by fixed rules of law. Where the ultimate conclusion can be arrived at only by applying rules of law the result is a 'conclusion of law.' A 'finding of fact' is a conclusion drawn by way of reasonable inference from the evidence."
>
> Thus, it has been said that if facts are undisputed and only one, if any, inference can reasonably be drawn from those facts, the determination of that inference is a question of law. When, however, facts are not in dispute but permit the drawing of different inferences, the drawing of one such permissible inference is said to be a finding of fact. Findings of fact are the realities as disclosed by the evidence as distinguished from their legal effect or consequences.[36]

If, as *Slope County* attempts to teach us, the process of finding facts not only requires "natural reasoning" but also leads to "realities," then, by Jove, we lawyers want no part thereof! On the other hand, perhaps a greater hospitality to "mixed questions" would be beneficial.

An open proclamation that deference to the decision of a trial judge is a matter of degree, with the degree of deference being a function of the amount of "facts" which seem to infuse the case, could perhaps lead to more candid and realistic arguments being made to appellate courts, and to those courts making more candid and realistic decisions. There is a criticism implicit in my last statement. The criticism is that at times, by labeling certain issues as issues of fact and by purporting to apply the "clearly erroneous" test to such issues, an appellate court is not being candid with itself and with the bar as to what it is actually doing. Moreover, by using the rhetoric of "factual findings" and "clearly erroneous," the court is forcing advocates before it to speak in the same terms, although the decision under review may involve an instance in which the judge is not so much (or at least not entirely) finding "what happened" as the judge is deciding, as a matter of good policy and fairness, what ought to be done about "what happened."

What I have in mind specifically is the position taken by the North Dakota Supreme Court in domestic cases, in which the court almost invariably observes that decisions of trial judges on issues of child support, spousal support, an equitable division of property, and child custody, involve matters of fact and, hence, are subject to the "clearly erroneous"

36. *Id.* (citing Henzel v. Cameron, 365 P.2d 498, 503 (Or. 1961)) (citations omitted).

rule.[37] To be sure, such issues are very "fact intensive," and the ability of and the necessity for the trial judge to make numerous credibility evaluations indicate that great deference is due to the trial judge's resolution of such matters. It goes too far to say, however, that the ultimate issue is essentially one of fact. Is it really proper to say that the process of deciding which parent should be awarded custody of the children can be viewed essentially as being on the same plane and as being an exercise of the same character, as the process of deciding whether at a certain time and place the light was red for the driver of the Chevrolet station wagon?

The latter process concerns itself with an objective investigation of observable physical phenomena. The former process concerns a more or less subjective investigation of intangible and immeasurable matters, like character, temperament, aspirations, sympathies, and personal failings. More importantly, not only is the former predictive and the latter historical in perspective, but also the former requires the judge to make *ad hoc* moral judgments on behalf of society which are not called for in the latter.

Deciding child custody is basically an attempt on the part of the judge to predict as best he or she can which parent will provide the better environment and example for the children during that uncertain period of time when the custodial parent will have an influence on their lives. It is somewhat akin to predicting today who will be the Super Bowl winner five years hence. But even this analogy fails. Today's prediction as to the winner of a future Super Bowl eventually can be shown to have been correct or incorrect when made. But the correctness of child custody decisions are seldom testable in the same manner. If, contrary to the trial judge's hopes and expectations, 'A' performs miserably as a parent, does it follow that the judge made an "incorrect" decision? How can we know with certainty that 'B' would have done any better? In view of all the considerations detailed above, how can the award of child custody legitimately be called "an issue of fact?"[38]

To be sure, the issue of child custody may often be factually intensive. Its ultimate resolution may be based upon the construction of a mosaic, each tile of which is fashioned by the judge's separate weighing of the witnesses' relative truthfulness and competence on one disputed point or another. Yet, except in those cases in which one parent has acted like a beast and the other surely will be a candidate for beatification, the ulti-

37. *See, e.g.*, Kraft v. Kraft, 366 N.W.2d 450, 453 (1985).

38. Similarly, it is difficult to accept the contention made repeatedly by the North Dakota Supreme Court that a trial court's decision as to what constitutes an *equitable* property division between divorcing spouses is a "finding of fact." Equity, like beauty or merit, is in the eye of the beholder. Do we find as a verifiable "fact" that Mozart was a greater composer than Beethoven, or that orange juice tastes better than apple juice?

mate conclusion as to which parent is the fitter is essentially a matter of opinion.

It is a matter of opinion, in part, because as just demonstrated, it is not really a finding of fact. Nor is it really a conclusion of law. Implicit in a conclusion of law is the notion that the judge is not consulting his or her own belief as to what makes up a "just result" in a given situation. Rather, the judge is deferring to the view of the lawmaker, expressed as a rule of law, as to what justice requires under the circumstances. Thus, a judge may believe personally that the "race to the courthouse" system of filing adopted by the Uniform Commercial Code often works an injustice, but the judge enforces the system because "it is the law." In a child custody case, the judge is supposed to award custody in the manner consistent with the "best interests" of the children. Does anyone suggest seriously that in being obligated to follow this principle, a trial judge is forced to subordinate his or her own will to that of the lawmaker? Or that a judge left to his or her own devices might follow a "worst interests" rule? Can it be contended fairly—in view of the generality, amorphousness, and subjectivity of the "best interests" test—that such test is a rule of law in the sense that the Uniform Commercial Code "race to the courthouse" rule is a rule of law?

If an award of child custody is neither a finding of fact nor a conclusion of law, it must be something akin to an opinion. Why can't we—lawyers and judges—say that? Why can't we say that some things are not really findings of fact, or at least not entirely so, and that they are not really conclusions of law, or at least not entirely so, and that it is not really satisfactory to call them "mixed questions of fact and law," but rather they are, by golly, matters of opinion? Having so stated, appellate courts could openly profess to act, or attempt to act, or actually act, in one of two ways.

Under the first alternative, the upper courts would say something like the following:

> As the decision under review essentially involves a matter of opinion, and as one person's opinion is usually as valid as another's, we should be extremely chary about substituting our collective opinion for that held by the trial judge. Consequently, we should employ a standard of review similar to the "rational basis" test which is used in reviewing the constitutionality under the Fourteenth Amendment of statutes which regulate economic affairs. Under that standard, an economic regulation will not be invalidated if the reviewing court can conceive of any rational basis for its enactment. Under our "award of child custody" version of the rational basis test, we are not going to overrule a trial judge unless the appellant can show us

> (1) either explicitly or by implication the judge found certain material facts to be true, and (2) the evidence bearing on those facts was such that no rational person, not even a judge, could have found them to be true, and (3) in the absence of such facts no rational person would have awarded custody as did the trial judge, or (4) in the alternative, the appellant must show us that, accepting the judge's view of the facts as he or she must have viewed them, the decision was one which no rational person would have made.[39]

Under the second alternative, in recognition that one judge's opinion is a decidedly small sample of the communal wisdom concerning that about which he or she opines, and thus could be rather aberrant, the appellate court could say:

> Because a decision as to child custody is essentially a prediction of future events, and thereby really a matter of opinion, we will (albeit reluctantly) reverse a trial judge's decisions about such matters when it appears to us that, after assuming the facts to be as the trial judge apparently viewed them, our own opinion of the best course to follow (or of the least undesirable choice), differs substantially from the opinion of the lower court. Alternatively, we will reverse the trial court if appellant's counsel by argument to the record can persuade us, under a clearly erroneous standard, that the trial court's view of the true facts of the case was flawed, and that such distorted view likely affected the judge's opinion.

I leave as an exercise to the reader the determination whether the North Dakota Supreme Court hews rather more closely to the second alternative than the first in reviewing the issues in domestic cases mentioned previously, notwithstanding its public avowal of the first alternative (or its "findings of fact . . . clearly erroneous" equivalent). But whatever test the court purports to use, I submit that its decision-making process would be clarified and better assisted by counsel if it openly recognized

39. Indeed, in my view, this "rational basis" test may be what the North Dakota Supreme Court actually has in mind as being appropriate for certain issues in domestic cases, although it expresses the test in terms of issues which involve "matters of fact" and which consequently are subject to review only under a "clearly erroneous" standard. It may be that the court adopted the reasoning that certain issues in domestic cases involved matters of fact, not because the issues seemed similar to a dispute of the "in which direction was the light red?" variety, but because the court wanted to cleave to, or thought it wanted to cleave to, the "clearly erroneous" standard of review which is conjoined with the "finding of fact" label. To be sure, the court could have attained very much the same result by saying that in such matters the trial judge has wide discretion and will be reversed only for an abuse of that discretion, but no doubt when it comes to a highly emotional subject like that of child custody, any court would be reluctant to say something so chilling and apparently cavalier.

and took into account that many times the proper resolution of such issues is essentially a matter of opinion.

VI. CODA.

In conclusion, and in repetition, we make too much ado about the supposed distinction between "fact" and "law." Music provides a fitting analogy for the view we ought to take of the interaction between law and fact. Law and fact can be likened to the melody and the rhythm which unite to make a musical piece. Conceptually they are distinct, but rhythm without a tune is only the sound of clockwork, and the best known melody in the world would be unrecognizable if its notes and rests were sounded for a wide variety of randomly chosen time values. Therefore, although we may choose to emphasize and study the rhythm in one musical piece, or the tune in another, it is futile to attempt to completely divorce the tune from the beat.

Similarly, it is futile to attempt to completely divorce issues of fact from issues of law. Instead, we should recognize the wisdom disguised in the old bromide: "The Law is a Seamless Web."